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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-125

ALAMO LAND & CATTLE CO., INC., Petitioner,

v.

STATE OF ARIZONA, Respondent.

OPENING BRIEF OF PETITIONER

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OPINIONS BELOW

The favorable to Petitioner Opinion and Judgment of the District Court, dated May 5, 1972, (R.[1] 224-228) will appear in the Single Appendix, which by stipulation has been deferred. The unfavorable to Petitioner Opinion of the United States Court of Appeals, Ninth Circuit, appears in the Appendix to Petitioner's Petition for Writ of Certiorari.

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1. R. means Record

JURISDICTION

Jurisdiction of The United States Supreme Court is envoked under 28 *U.S.C.* § 1254(1). The Petition for Writ of Certiorari is timely because it was docketed in The Supreme Court on August 15, 1974, which, pursuant to Rule 36 of *The Federal Rules of Appellate Procedure*, as contemplated by 28 *U.S.C.* § 2101, was within ninety days from May 17, 1974, the date of denial by the Court of Appeals of Petitioner's Petition for Rehearing to that court.

CONSTITUTIONAL PROVISIONS, STATUTES AND ACTS INVOLVED

These are all contained in the Appendix that is a part of this brief and are *U.S.C. Constitution Amendment* 5; § 28 of the *New Mexico-Arizona Enabling Act*, such being found at 36 *U.S. Stat.* 557, 568-579 (1910) and in 1 *A.R.S.*[2] at 79-98; *A.R.S.* § 37-231A, § 37-242, § 37-284, § 37-288, § 37-290, § 37-291, § 37-293 and § 41-511.06 (effective 1957).

QUESTIONS PRESENTED FOR REVIEW

1. Do the *New Mexico-Arizona Enabling Act* provisions concerning school trust land granted to Arizona that specifically permit leasing of said land but generally provide that no sale or other disposal of the land shall be for less than its full appraised value but say nothing about condemnation or who shall receive said proceeds upon condemnation,

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2. *A.R.S.* means *Arizona Revised Statutes*

require, upon condemnation by the United States of America of the leased land, assuming the value of the land has not been enhanced because of the leasehold,[3] that Arizona receive the full value of said land and its tenant receive only the value of its improvements?

2. Even if Question Presented No. 1 is answered negatively to lessee-Petitioner, does the *New Mexico-Arizona Enabling Act* preclude the lessee from receiving that part of the land condemnation monies that represent the enhancement of the value of the land because of the leasehold under circumstances wherein Respondent Arizona receives more than the full value of the land as it would be valued without the leasehold, to-wit: Petitioner's use of the property in conjunction with other property owned or operated by Petitioner?

STATEMENT OF THE CASE

The United States of America condemned two sections of land owned by the State of Arizona in trust pursuant to § 28 of the *New Mexico-Arizona Enabling Act*, which section is set forth in the Appendix hereto. At the time of the condemnation,

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3. There was credible evidence below that such enhancement exceeded Respondent's award. This question is presented with this contrary assumption to better analyze the law and the principal case relied upon by Respondent. A negative answer means Petitioner prevails. An affirmative answer necessitates consideration of Question Presented No. 2, which then considers whether Petitioner's award was justified because it represented only a part of the enhancement in value of the land because of Petitioner's use of the property.

as said *Act's* sections specifically allow, a lease was in existence between Respondent Arizona and Petitioner. At such condemnation time, these two sections were part of Petitioner's operating cattle ranch that contained 1,064.9 acres of fee lands, condemned in a separate proceeding,[4] but without consideration of Petitioner's 43,403.97 acres of federal domain held under *Taylor Grazing Act* permits issued in accordance with 43 *U.S.C.* § 315*B*.[5] The location of these various different types of land classifications is described on Exhibit A (D. Ex. A; T.[6] 15, 22) the fee land being outlined in blue, State Lease lands in orange, and the Taylor Grazing Permit land outlined in red.

The United States tendered to the Federal Registry the sum of $48,220.00 for one of the State Lease sections and $70,400.00 for the other, or a total of $118,620.00. Petitioner and Respondent agreed this amount was reasonable. The dispute at issue results from a distribution hearing before the District Court wherein Petitioner was awarded $3,600.00 for its improvements, $57,050.00 for its current and reasonably prospective leasehold interest, and Respondent was awarded $57,970.00.

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4. United States of America v. 1,071.08 Acres of Land, more or less, situate in Yuma and Mohave Counties, State of Arizona, et al, No. CIV. 69-101 Phoenix WEC, In the United States District Court for the District of Arizona.

5. *United States* v. *Fuller*, 409 U.S. 488, 93 S. Ct. 801, 35 L. Ed. 2d 16 (1973), held that the 5th *Amendment* created no property rights that would permit Petitioner to receive compensation for any value added to the fee lands by said permits.

6. T. means Reporter's Transcript of proceedings.

See Opinion and Judgment of The District Court (R. 224-228), to be contained in the Single Appendix. The United States Court of Appeals reversed, saying Petitioner was only entitled to receive $3,600.00 for its improvements, and Arizona the balance, *United States v. 2,562.92 Acres, Yuma & Mohave Co., Ariz.*, 495 F.2d 12 (9th Cir. 1974).[7]

At the distribution hearing, Petitioner proved, as found by the District Court, that:

> ". . . the true value of the premises would be reflected in the use of the premises in connection with other properties owned or controlled by Alamo [Petitioner] as a cattle ranch; that the property would otherwise be relatively, of no value."
> (R. 224-228)

Consequently, Petitioner contended that pursuant to established federal law condemnation principles, it was entitled to receive, in addition to the value of its improvements, either the difference between the fair market value of the property and the value of the lessor's interest or the amount of the enhancement of the value of the property solely because of its leasehold, to-wit: the difference between the value of the property with the leasehold and what it would have been without the leasehold.

Petitioner's cattle farm[8] and ranch,[9] including the State Lease sections at issue, was isolated, the nearest paved highway, but for a road relating

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7. See Appendix to Petitioner's Petition for Writ of Certiorari.

8. Referring to irrigated pasture.

9. Referring to desert grazing.

to the condemnation, being 30 miles away. (T. 28-32) Two blue marks on Exhibit C (D. Ex. C; T. 28, 33) a map, show that State Lease sections. (T. 35) There was no contradiction at the hearing of Petitioner's appraiser's unequivocal statement that the two lease sections considered by themselves and not in connection with Petitioner's cattle operation would have a fair market value of $40,000.00 to $50,000.00. (T. 39, 88)

One of these sections did have a spring utilized for cattle watering which greatly contributed to the value of Petitioner's cattle operation as a whole because it was between and tied in Petitioner's irrigated pasture lands by the river, the heart of the property, with the sparsely grazed Taylor Grazing land. (T. 14, 16, 18, 20, 21, 92, 93) The other State Lease section had two wells, one operable and one not. (T. 20, 21)

Petitioner's above fee land was along the Bill Williams River. (T. 14; D. Ex. A; T. 15, 22) Of this, at a time a few months before the taking below of May 21, 1966 (T. 13, 14), approximately one-half of Petitioner's fee land along a river was developed or was being developed to irrigated farm land for pasture forage for use in connection with said State Lease and Taylor Grazing lands. (T. 14, 17) The two State Lease sections at issue are high land with roll and not irrigable. (T. 95, 96) At said time, 192 acres of said fee land had already been developed for ditch gravity irrigation, 43.2 acres for sprinkler irrigation, and 280 acres were being developed to gravity ditch irrigation. (T. 17)

The appraisal of The United States of America was received in evidence. (D. Ex. D; T. 85, 95) It contained a statement:

> "Consequently, the market value of these river bed lands is inseparable

from their usefulness in connection with the dry grazing areas on both sides of the river, which desert areas are useful only when water, livestock control, and dependable forage can be relied upon." (T. 86)[10]

The riverbed lands were Petitioner's fee lands while the desert areas included the State Lease lands. Petitioner's appraiser explained this above-quoted statement meant that the appraiser for The United States of America:

". . . gave consideration to the fact that the state lease land is a part of an operating unit and has value because it serves as a part of that unit with the dependable irrigated forage . . ." (T. 87)[10]

It was firmly established policy that renewals of State grazing leases would preferentially and customarily be granted[11] until there was a change in use to a higher land value such as residential, commercial, industrial or agricultural. (T. 23, 26, 27, 103, 104, 116, 119; D. Ex. D; T. 85, 95) Said appraisal of the United States (D. Ex. D; T. 85, 95) considered and recognized such policy. It provided:

"Tenure has been stable even when

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10. The District Court expressly adopted this reasoning and testimony as shown by the above quotations from his opinion and order, page 5 hereof.

11. Such is Arizona statutory and case law. § 37-291 *Arizona Revised Statutes, 1956; Ehle v. Tenny Trading Co.*, 56 Ariz. 241, 107 P.2d 210, 212.

> the lessees have cancellation clauses and termination dates. Preference for renewal has been both officially sanctioned and practiced as a custom." (T. 87)

As above, the State Lease property was only suitable for grazing purposes. The purpose of this testimony was to provide the basis for estimating how long Petitioner would have been in possession of the property as lessee had the condemnation not occurred,[12] which, as above shown, was at least until a higher use was available. Petitioner's appraiser, based on the properties' remote location and Arizona population trends, thought 36 years. (T. 30-35) The District Court thought 26 years. (R. 224-228)

In recognition of the senior interest of the State, Petitioner's appraiser determined the present value of the right of the State of Arizona to receive the property back at the end of the lease term, plus the anticipated renewal, plus the value of the right to receive the rents specified in the lease for the term of the lease and its expected renewal, and attributed to Petitioner as lessee the difference between these two sums and the monies paid for just compensation by the United States, less the value

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12. The Arizona Supreme Court held that such right of renewal "is a valuable, substantial right" and said that not "to recognize equities in those who have built up a ranching business . . . would be injurious if not destructive to that industry." *Ehle v. Tenny Trading Co.*, 56 Ariz. 241, 107 P.2d 210, 212. The New Mexico Supreme Court held that a state lessee was entitled to compensation for the leasehold interest, including "a renewal that could reasonably be anticipated." *State ex rel. State Highway Comm'n v. Chavez*, 80 N.M. 394, 456 P.2d 868, 872 (1969).

of Petitioner's improvements. (T. 38) This is a well-recognized and documented appraisal technique. (T. 45) After gentle prodding by the Court, and after consultation with Respondent's appraiser, Respondent's attorney stipulated to the qualifications of Petitioner's appraiser. (T. 13) Based on an expected lease term of 26 years, including renewals, the present worth of the right of Arizona to receive the rents for 26 years and of the reversion, or Arizona's right to receive the property back at the end of the lease period, was the rounded off sum of $57,970.00. (T. 97) The value of Petitioner's interest was the improvements or $3,600.00, plus the difference between the condemnation monies less improvements and the State's said interest, or $57,049.52, or a total of $60,650.00. (T. 97) The District Court adopted this testimony awarding Arizona $57,970.00 and Petitioner $60,649.00 (R. 224-228)

ARGUMENT

I. About Question Presented No. 1:

This argument supposes, contrary to substantial testimony before the District Court, that the property at issue had *no* enhancement in value by being a part of a working cattle farm and ranch. This assumption permits a direct analysis of *Lassen v. Arizona Highway Dep't*, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967) without deciding whether such case is satisfied by the testimony about enhancement. If Petitioner loses on this question, then it turns to Question Presented No. 2 for the effect of the enhancement testimony.

The opinion of the United States Court of Appeals attempted to avoid the 5th *Amendment*, which it recognized would ordinarily require Petitioner to receive just compensation for its leasehold

interest by saying, "However, under the Enabling Act, Arizona, as trustee, had no power to grant a compensable property right to Alamo [Petitioner]". 495 F.2d at 14. Laconically, the reasoning was that Arizona held the lands as trustee and the trust would be violated if it received less than the full value of the fee and to hold otherwise would be in contravention of *Lassen v. Arizona Highway Dep't*, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967). Although *Lassen* specifically stated that "the Enabling Act unequivocably demands both that the trust receive the full value of any land transferred from it and that any funds received be employed only for the purpose for which the land was given" [87 S. Ct. 588], *Lassen* did not consider condemnation rights of a state lessee. *Lessen* determined that upon condemnation of these trust lands by Arizona, Arizona must pay full value to the school trust. Neither *Lassen* nor any other decision of this Court has determined that upon condemnation the lessee is not entitled to just compensation for its leasehold interest. The question then becomes whether an *Enabling Act* [Arizona's] which provides that when the school trust lands are offered for sale they must be "appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained . . ." [§ 28 of said *Act*] and also provides for leasing the property, but which is silent about condemnation, means that upon condemnation the lessee receives nothing for its leasehold interest and such is not violative of the 5th *Amendment*.[13] While said provision just quoted requires condemnation by the state of trust fund lands, because literally applied it requires that upon disposition of the land, an appraised true value be paid, the provision does not say who the funds shall be

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13. Herein leasehold interest is distinguished from the value of improvements which was $3,600.00.

paid to. It does not say only to Arizona. It does not say, even if it applies to condemnation, if true value means of Arizona's lessor's interest without any consideration of enhancement in value of the property because of its use in conjunction with other properties owned or operated by Arizona's tenant.

Contrary to the reasoning of the Opinion of the United States Court of Appeals, § 28 of the *New Mexico-Arizona Enabling Act* specifically permits leasing, saying in part "nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing . . . purposes . . .". The Arizona Legislature, without qualification as to whether the land leased by the State was trust land or otherwise, said that Arizona, "in seeking to establish a state park or monument on state . . . owned land . . . shall not request the termination or cancellation of any valid lease . . . unless adequate compensation is awarded to the holder of such lease . . ." and further "in any event the holder of such lease . . . shall receive fair and adequate compensation for the cost of and damage to his property interest or loss of his lease . . ." and that "in determining the amount of such compensation, consideration shall be given to any preferential rights of renewal and other preferential rights of the owner or holder thereof, the damage to the remaining land . . . and damage to the rights and option which such owner may have and of other relative factors." *A.R.S. § 41-511.06*, Added Arizona Session Laws 1957, Ch. 99, § 1. This is recognition of the preferred right to renewal expressed by the Arizona Legislature in *A.R.S. § 37-291*, 1956, and interpreted by the Arizona Supreme Court as "a valuable, substantial right" in *Ehle v. Tenny Trading Co.*, 56 Ariz. 241, 107 P.2d 210, 212.[14]

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14. The lease recognizes all this for it provides

As stated by New Mexico in *State ex rel. State Highway Comm'n* v. *Chavez*, 80 N.M. 394, 456 P.2d 868, 873, to not allow such compensation for the leasehold interest "would be of questionable constitutionality as permitting the taking or damage of property without the payment of just compensation." 456 P.2d at 873. Perhaps this is why § 28 of the *Enabling Act* did not provide what happens upon condemnation.

United States v. *Fuller*, 409 U.S. 488, 93 S. Ct. 801, 35 L. Ed. 2d 16 (1973), mentioned in Footnote 5, aids Petitioner and supports said reasoning in *State ex rel. State Highway Comm'n* v. *Chavez*, 80 N.M. 394, 456 P.2d 868. The basis of its holding "that the Fifth Amendment does not require the Government to pay for that element of value based on the use of respondents' fee lands in combination with the Government's permit lands" was that "The provisions of the Taylor Grazing Act quoted ante make clear the congressional intent that no compensable property might be created in the permit lands themselves as a result of the issuance of the permit.". 93 S. Ct. 801, at 805. Nothing in *Lassen* v. *Arizona Highway Dep't*, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967), nor in the *Enabling Act* makes clear a congressional intent that Arizona's lessee shall not have a compensable property right in the leased lands and to the contrary, the above *A.R.S.* § 41-511.06, refers to the lessee's interest as a "property interest".

Statements in the Opinion of the United States Court of Appeals below that "However, under the

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that it "is issued subject to all the provisions and requirements thereto, which are found in the various Acts of the Legislature of the State of Arizona, the same as though they were fully set forth herein." Section (1) (D. Ex. B; T. 22, 23)

Enabling Act, Arizona, as trustee, had no power to grant a compensable property right to Alamo", and that "Alamo therefore never acquired a property right to which it is entitled to compensation" (495 F.2d at 14) are in opposition to said Arizona statute (*A.R.S.* § 41-511.06) and the following reasoning of the United States Court of Appeals in *Nebraska v. United States*, 164 F.2d 866 (8th Cir. 1947), *cert. denied*, 334 U.S. 315 (1948):

> "It [the Nebraska Enabling Act] did not agree that, should condemnation of such land subsequently become necessary for its sovereign purposes, it would pay more than the fair market value of the land in compensation. It did not assume to save the State harmless in such a situation from a diminution in the market value of the State's rights through the creation of a leasehold, easement, or other interest in the land by the State's own acts.
>
> "As a matter of fact, except only as the State has undertaken to condition the exercise of its grant of the power of eminent domain over school lands, it has expressly recognized that it cannot expect to escape the pecuniary consequences of creating leaseholds in such lands." 164 F.2d at 869.

Nebraska v. United States, as just quoted, saying that *Nebraska's Enabling Act* "did not assume to save the state harmless" in condemnation "from a diminution of the market value of the state's rights through the creation of a leasehold . . ." is recognition that the *Nebraska Enabling Act* could have so provided by in essence setting forth the same thing as a condemnation clause in a lease wherein it is said that upon the taking by eminent

domain of the whole or a part of the premises leased the term shall come to an end and the lessee shall receive nothing upon condemnation [see 4 *Nichols on Eminent Domain*, § 12.42(1) at 12-488, 489]. Neither the *Nebraska* nor the *New Mexico-Arizona Enabling Act* so provide. Consequently, the *Fifth Amendment* does require compensation for Petitioner's leasehold interest. This is to say that since denial of the state lessee's right to receive just compensation for his leasehold interest is to work a forfeiture, such denial will not be implied, but only effected when no other result is possible. 2 *Nichols on Eminent Domain*, § 5.23(2) at 5-94, wherein it is stated:

> "It has been held that the law does not look with favor on clauses causing forfeiture of the lessee's interest on condemnation, hence, a lease covenant will be construed not to have that effect if its language and the circumstances possibly permit."

Logic and common sense explain why there is no provision in the lease or *Enabling Act* that terminates the lease without compensation to the lessee upon eminent domain proceedings. This is that such termination, as the State of New Mexico stated in its Amicus Curiae Brief, could "result in recall and loss of loans with further disasterous effects in New Mexico." (Page 6 thereof.) This is precisely what was said in the Amicus Curiae Brief in Support of The Petition for Writ of Certiorari (one brief) by The Federal Land Bank of Wichita and The Federal Intermediate Credit Bank of Wichita and many listed Production Credit Associations. The very isolation of the leased land herein shows that if the Opinion of the Court of Appeals below is correct, the school trust fund stands to lose much leasing revenue because what other leasing use does the property have except for grazing purposes, and who could afford to lease the property except

large[15] ranchers? The very fact of the amicus curiae briefs establishes that these thoughts are real and not frivilous.

Footnotes 2 and 3 of *Lassen v. Arizona Highway Dep't*, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967), show that the grants by the United States of school trust lands was four sections in each township. They further establish that the total national acreage of lands given in support of common schools is 78,000,000 acres, and Arizona's 8,000,000 acres. Appendix C to Petitioner's Petition for Writ of Certiorari, Bureau of Land Management Tables, shows the distribution between the states of such properties. The total in Arizona and New Mexico is almost 17,000,000 acres., See Appendix C to Petitioner's Petition for Writ of Certiorari, page 10 of Amicus Curiae Brief in Support of Petition for Writ of Certiorari by White Sands Ranchers Association and page 1 of Brief of State of New Mexico in Support of Petition for Writ of Certiorari. By the very nature of the relatively limited population and desert and mountainous terrain of New Mexico and Arizona, the overwhelming majority of these lands are isolated and leaseable only for grazing purposes. The State of the Case herein shows that the situation that existed below is typical. Then, to deny upon condemnation a compensable right to lessee is to prevent considerable revenue to the State and severly interfere with the cattle industry. This explains why New Mexico in its Amicus Curaie Brief takes a more farsighted and realistic view, than Arizona's.

If the Court adopts Petitioner's position that

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15. "Large" is used because obviously grazing cattle just on the state lease sections would not be an economically feasible operation. In showing this Respondent did not realize it supported Petitioner's enhancement theory. (T. 72-74)

the *Enabling Act* does not prevent it from receiving just compensation for its leasehold interest, it then becomes necessary to consider whether the lease did. The opinion below of the Court of Appeals said:

> "1. The lease specifically provided that:
>
> a. It was made subject to the laws of Arizona.
>
> b. In the event the State relinquished the property to the United States, then the lease shall be null and void as it may pertain to the land so relinquished.
>
> c. No provision of the lease shall create any vested right in the lessee.
>
> "2. Sections 37-242 and 37-293 of the Arizona Revised Statutes restrict a lessee's participation in the proceeds of a sale of public land to the value of improvements.
>
> "We do not find it necessary, however, to determine the rights of Alamo based upon these lease provisions or the state law." 495 F.2d 12 at 14.

Arizona did not relinquish any land to the federal government. The complete vesting provision said:

> "The terms, conditions and covenants of this lease are subject to present laws relating to state lands and the rights of both lessor and lessee hereunder are each and all subject to such modifications

> as may be consistent with such amendments, revisions or repeals of existing laws as may hereafter be made and no provision of this lease shall create any vested right in the lessee herein." (D. Ex. D; T. 85, 95)

The prohibition against vesting simply means there are contingencies that can terminate the lease, not that Petitioner has no condemnation rights in the leasehold. See *Snortum* v. *Snortum*, 155 Minn. 230, 193 N.W. 304, 305, which recognized that the well-understood meaning of the word "vested" was that the estate involved is no longer subject to any contingency. There is even a contingency in the preferential right of renewal, because it is not absolute. See *A.R.S.* § 37-284. *A.R.S.* § 37-288 permits forfeiture and § 37-290 permits cancellation of the lease if the lands are reclassified to a higher use, although the lessee does have a preferred right to re-lease. Although the section proceeding the last portion of the lease just quoted specifically provides that the lease could be terminated upon reclassification of the property and *A.R.S.* § 37-231*A et seq.* permits sale of the leased property, upon reclassification the lessee has a preferred right to lease the reclassified land, *A.R.S.* § 37-290, and upon sale a successful bidder other than the lessee must pay the lessee the value of its improvements. *A.R.S.* § 37-242, 1956, and § 37-293, 1956.

All this establishes that neither the *Enabling Act* nor the lease nor Arizona Statutes or law prohibits Petitioner receiving what the District Court awarded. The *Fifth Amendment* demands it.

The method utilized by Petitioner's appraiser giving paramount consideration to Respondent's lessor's interest by first valuing its present value and attributing the difference between such and what the condemnor paid is similar to the position

of the United States of America contained in the following wording from its Amicus Curiae Brief in support of granting Certiorari:

> "Our position here is in harmony with that reading of Lassen: the State, acting in its capacity as trustee, must receive the full value (fair rental value as of the beginning of the lease term) of the possessory interest transferred by lease, and upon condemnation also must receive the full value of its reversionary interest. But it is not additionally entitled to receive the compensable value of the leasehold interest. Cf. State of Nebraska v. United States, 164 F.2d 866 (C.A. 8), certiorari denied, 334 U.S. 815."

This appraisal technique utilized by such appraiser[16] is supported both by recognized appraising authorities as shown by the Statement of the Case and by appellate decisions: *Edmund Realty Co. v. Walmer Bldg. Co.*, 123 F.2d 54 (8th Cir. 1941); *Baltimore v. Latrobe*, 101 Md. 621, 61 A. 203, 4 Am. Ann. Cas. 1005 (1905); *Chicago, etc. R.R. v. Chicago Mechanics' Institute*, 239 Ill. 197, 87 N.E. 933 (1909); *City of Chicago v. Lord*, 276 Ill. 544, 115 N.E. 8 (1916); *City of Cincinnati v. Smythe*, 57 Ohio App. 70, 11 N.E.2d 274, 275 (1937).

This is consistent with basic Arizona law that requires apportionment of damages between the owners of the fee and of the leasehold as their respective interests may appear. *State v. Carrow*,

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16. Determining the present value of the lessor's rights to receive rents and the reversion and allocating to the lessee the difference between this and the monies paid.

57 Ariz. 429, 114 P.2d 891, wherein the court said:

> "It is necessary, therefore, that the judgment be reversed and the case remanded for a new trial upon the issue of damages for erosion, diversion of drainage, and loss of use as a cattle range, with instructions to apportion the damages for these elements between the owners of the fee and of the leasehold of the land damaged as their respective interests may appear." 114 P.2d at 893.

Speculation in the Amicus Curiae Brief of the United States about any disparity between lease-rentals and fair market value cannot be considered by this Court because no evidence about this was presented below. *Ramsey* v. *United Mine Workers of America*, 401 U.S. 302, 91 S. Ct. 658, 28 L. Ed. 2d 64, *on remand*, 344 F. Supp. 1029, *appeal after remand*, 481 F.2d 742, *cert. denied*, 414 U.S. 1067, 94 S. Ct. 576, 38 L. Ed. 2d 473, discussion under syllabus 4, 91 S. Ct. 658 at 664, 665.

The appraisal of the United States by considering the State Lease property useful only as a part of Petitioner's cattle operation because of Petitioner's dependable forage on the land it owned and Petitioner's preferential renewal necessarily recognized Petitioner's leasehold interest. By denying such, Respondent seeks a windfall. This leads to the argument about Question Presented No. 2.

II. About Question Presented No. 2:

Argument here becomes necessary only if the Court decides that *Lassen* v. *Arizona Highway Dep't*, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967), and/or the *New Mexico-Arizona Enabling Act* requires that Arizona receive no less than

the full value of the property, regardless of the *Act* permitting leasing and not containing any language prohibiting upon condemnation the lessee receiving the value of its property interest. This argument considers the effect of the enhancement in value testimony. The conclusion in *Lassen* that "the Enabling Act unequivocally demands * * * that the trust receive the full value of any lands transferred from it" (87 S. Ct. 588) is specifically based upon provisions of the *Act* referring to the sale of the land at public auction. The third paragraph of § 28 of the *Act* restricts sale at a public auction to the highest and best bidder. The next paragraph, quoted in *Lassen*, before the sale, requires the lands to be "appraised at their true value." 87 S. Ct. at 588. The following paragraph, also quoted from in *Lassen*, still referring to such public auction sale mentioned two paragraphs above, then provides that "no sale or other disposal * * * shall be made for a consideration less than the value so ascertained * * *". 87 S. Ct. at 588, 589. Consideration of how the property would be appraised at such a sale sheds light upon what is meant by full value. Unless the purchaser were Petitioner, the purchaser would not have the right to utilize the property in conjunction with Petitioner's cattle business. Consequently, the property would be appraised without regard to any enhancement in value because of its use by Petitioner in conjunction with the lands owned and operated by Petitioner.

The very isolation of the property, its being surrounded by properties operated by Petitioner, and the inability of anyone to economically use the land, except petitioner, support the observation of the District Court quoted on page 5 hereof that the property would be relatively of no value unless its value is reflected in its use in connection with other properties owned or controlled by Petitioner. This true value or enhancement in value because of such use was recognized in the appraisal of the United States of America. Surely the *Fifth Amendment* and

common sense require that such full value referred to in *Lassen*, if, in spite of Petitioner's argument in Question Presented No. 1, it applies to condemnation, only applies to the extent of determining the full value of the trust lands as such would exist without consideration of any enhancement in value thereof because of the lessee's said use.

The consideration by the United States of America of the enhancement of the market value of the property because it was being used by Petitioner in combination with other lands used by or belonging to Petitioner is in accord with recognized condemnation law. *4 Nichols on Eminent Domain § 12.314, pages 12-216*, 217, states:

> "Thus, where the adaptability for a specific use depends upon the land being used in combination with lands belonging to other persons, such use may be shown if the possibility of such combinations is so great as to have a definite effect in enhancing the market value of the property."

United States Supreme Court's decisions cited in the footnote in support of this statement are *Olsen* v. *United States*, 292 U.S. 246, 54 S. Ct. 704, 78 L. Ed. 1236 (1934); *McCandless* v. *United States*, 298 U.S. 342, 56 S. Ct. 764, 80 L. Ed. 1205 (1936); *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 63 S. Ct. 1047, 87 L. Ed. 1390 (1943); *United States* v. *Fuller*,[17] 409 U.S. 488, 93 S. Ct 801, 35

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17. The subject land there is adjacent to Petitioner's. If the decision below stands, Petitioner and those similarly situated will lose, upon condemnation, not only any enhancement of the value of their fee lands because of their Taylor Grazing permits, but the value of their leasehold interest in school trust lands leased from a state.

L. Ed. 2d 16 (1973). Because condemnation does "seek the value of 'the fee as a whole'" the law does permit "proof of the enhancing value of the lease." *4 Nichols on Eminent Domain*, § 12.36(1), page 12-435. The evidence below establishes that the enhancement of the market value of the property at issue because of Petitioner's use and operation of it in connection with other properties owned or controlled by Petitioner, was that such enhancement was greater than Petitioner received. This is so because the full value of the lands at issue, without consideration of such enchancement and use was $40,000.00 to $50,000.00, yet Arizona received $57,970.00. Such was simply "proof of the enhancing value of the lease". *4 Nichols on Eminent Domain*, § 12.36(1), page 12-435.

Even though the method of appraising the property as if it were not leased[18] to determine the value of the lessor's interest is unique, condemnation law permits a practical remedy in an unusual case, *United States* v. *Priest Rapids Irr. Dis't*, 175 F.2d 524 (9th Cir. 1949), wherein the court said:

> "As we have indicated above, the procedure which applied the Schwellenbach formula appears to have been born of necessity due entirely to the awkward posture of the case, but it also clearly appears that in applying it the lower court was appraising realities and utilizing a practical remedy which, in its end result, insured payment of just compensation for any property taken in this case. If applying the formula did not result in denying just compensation for property here taken, it is not open to attack on purely technical grounds.

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18. The $40,000.00 to $50,000.00 testimony.

We would sacrifice substance to form if we reached any other conclusion." 175 F.2d 524 at 531.

Cf. Richland Irr. Dis't v. United States, 222 F.2d 112 (9th Cir. 1955), and *United States v. Citrus Valley Farms, Inc.*, 350 F.2d 683 (9th Cir. 1965). In the latter case, the District Court applied common sense in instructing the jury in a then first-ever condemnation-valuation problem, which was readily upheld, which allowed the jury, if it so found, to deduct the value of a so called right to arrive at just compensation for the landowner.

CONCLUSION

Petitioner requests that the Court reverse the decision of the United States Court of Appeals below and affirm the decision below of the United States District Court, either because the *Enabling Act* applied to pertinent law, regardless of any enhancement of the property by the lessee's use in connection with other properties operated or controlled by lessee, permits the lessee upon condemnation to receive the value of its leasehold interest (Question Presented No. 1), or because in any event, upon condemnation, the lessee is entitled to receive that part of the condemnation award that represents enhancement in value of the property in excess of what the value would have been but for the lessee's use of the property in connection with other property owned or controlled by the lessee (Question Presented No. 2).

Respectfully submitted,

J. Gordon Cook

CERTIFICATION

J. Gordon Cook, being duly admitted to parctice before the Supreme Court of the United States of America, herewith certifies that three copies of the Opening Brief have been delivered to the State of Arizona by depositing the same in the office of the attorney for the State of Arizona who appeared below in the District Court and the United States Court of Appeals for the Ninth Circuit, to-wit: Peter C. Gulatto, Assistant Attorney General, State of Arizona, State House, Phoenix, Arizona 85007.

Additionally, as a courtesy, I herewith certify that service of three copies of this Opening Brief has been made upon the United States of America by depositing the same in a United States mailbox, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

J. Gordon Cook

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APPENDIX A

CONSTITUTION

AMENDMENT V-CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Malitia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ENABLING ACT

Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and domestic purposes, for a term of ten years or less; (2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and

production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocabor substances on, in, or under lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be produced therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12½ per centum of production; or (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee. As amended June 5, 1936, c. 517, 49 Stat. 1477; June 2, 1951, c. 120, 65 Stat. 51.

All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid. As amended June 5, 1936, c. 517, 49 Stat. 1477.

No lands shall be sold for less than their appraised value, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands,

or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, that said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this Act. As amended June 5, 1936, c. 517, 49 Stat. 1477.

The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: *Provided*, That such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder. Added June 5, 1936, c. 517, 49 Stat. 1477.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this act to said proposed State all land actually or prospectively valuable for the development of water power or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no land so reserved and excepted shall be subject to any disposition whatsoever of said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this

Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed. No money shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the said State to the contrary notwithstanding. It shall be the duty of the Attorney General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as many from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act.

APPENDIX B

ARIZONA REVISED STATUTES

§ 37-231. State Lands subject to sale; rights reserved in lands sold; state lands not subject to sale; development agreements

A. All state lands, except as otherwise provided for in this title, including all improvements made or placed thereon, or connected therewith, shall be subject to appraisal and sale as provided in this title.

§ 37-242. Payment by purchaser for improvements on land sold

A. When state lands on which there are improvements for which the owner thereof is entitled to be compensated are offered for sale, and the purchaser is not the owner of the improvements, the purchaser shall pay the person conducting the sale ten per cent of the appraised value of the improvements and the balance within thirty days thereafter. If the state land department determines that the amount at which the improvements are appraised is so great that competitive bidding for the land will be thereby hindered, the department may sell the improvements on installments payable ten per cent upon announcement of the successful bidder, fifteen per cent thirty days thereafter, and fifteen per cent annually thereafter for five years, together with six per cent interest on the balance remaining unpaid, which amount, until paid, shall be a lien upon the land. The purchaser shall at all times, keep the insurable improvements insured for the benefit of the state. Payments shall be made at the time

and in the manner prescribed for payments on the land, and any default in the payments for improvements shall be deemed a default in the payments for the land.

B. When improvements are sold on installments, the first twenty-five per cent, after deducting all rents, penalties and costs owing to the state on account of the land, shall be paid to the owner of the improvements, and the balance shall become a legal charge against the state.

C. Upon surrendering possession of any such land, the owner of the improvements thereof shall file with the commissioner of finance his claim for the balance on the improvements remaining unpaid, and if the claim bears the approval of the department as to correctness, and a certificate that possession of the lands and improvements has been surrendered by all persons having lawful claims for improvements on the land, it shall be paid by the state treasurer on the warrant of the commissioner of finance from any fund in which there is money subject to investment. As payments for the improvements are made by the purchaser, they shall be deposited with the state treasurer and both principal and interest shall be returned by him to the fund from which they were taken.

D. Failure to pay the balance of the purchase price or the fifteen per cent within thirty days after the announcement of the successful bidder shall constitute a forfeiture of all rights to the land and all payments made.

As amended Laws 1970, Ch. 190, § 51.

§ 37-284. Granting lease to one of several applicants; criteria; preference

A. If two or more applicants apply to lease the same land, the department shall approve the application of the one who, after investigation or hearing, appears to have the best right to the lease. The order of filing shall not be a controlling factor in deciding who is entitled to the lease. If it appears that none of the applicants has any right or equities superior to those of another, the department may, at a stated time and after due notice to all applicants, receive sealed bids submitted in accordance with rules and regulations of the department. The department shall approve the application of the bidder who in all respects is eligible to receive a lease upon the land and will pay the highest annual rental therefor, or the department may reject all bids.

B. Any person residing upon contiguous land for which he has an allowed United States homestead entry or for which he has received patent from the United States upon a homestead entry shall, upon application, have a preferred right to lease the amount of contiguous state land necessary for his personal use.

C. Any person lawfully occupying any lands, the title to which is acquired by the state by operation of law, shall have a preference right to lease the occupied land provided application so to do is made within thirty days from and after written notice by the state land department to such occupant of the acquisition of title.

As amended Laws 1961, Ch. 16, § 1.

§ 37-288. Forfeiture of leases; extension of payment

A. A lessee of state lands violating any condition of the lease shall forfeit the lease and his rights

thereunder. The state land department shall proceed to cancel the lease and take possession of the land or take such other steps as the interest of the state requires.

B. If the lessee fails to pay the rent when due, the department may extend the time for payment an additional period not to exceed ninety days. If an extension is granted, there shall be added to the rental a penalty of five per cent and interest on the delinquent rent and penalty at the rate of ten per cent per annum, until paid. The delinquent rent, penalty and interest shall be a lien on the improvements, crops, and property on the land. The department shall in no event extend the period for payment of rental more than three times and if the annual rental at any time is one calendar year in arrears, the lease shall automatically terminate and the department shall proceed to cancel it on the records of the department.

As amended Laws 1960, Ch. 82, § 2.

§ 37-290. Cancellation of lease by reclassification of lands; preferred right to lease reclassified land; refund of advance rental payments

A. Upon reclassification of state lands, whether upon application for reclassification or upon initiation by the commissioner, notice of the decision shall be served upon all interested parties of record in the department. If no appeal from the reclassification is taken as provided for by law, or if the decision of the commissioner is upheld on appeal, any lease upon the land reclassified shall be automatically cancelled, and the land offered for lease in the same manner as if it had not been previously leased.

B. A lessee, or an applicant for renewal of a lease at the time of the notice of the reclassification shall have a preferred right to lease the reclassified land at the reappraised rental thereof for a term not longer than ten years as determined by the department.

C. Upon cancellation of the lease of reclassified lands, if the land as reclassified is leased to a person other than the existing lessee or applicant for a renewal lease, the unused pro rata of an advance rental payment made by the existing lessee shall be refunded to such lessee, and the lessee shall be protected in improvements on the land owned by the lessee in the same manner as provided in § 37-293.

§ 37-291. Preferred rights to renewal of lease; exceptions

A. Upon application to the state land department not less than thirty nor more than sixty days prior to the expiration of a lease of state lands, the lessee, if he is a bona fide resident of the state, shall have a preferred right to renewal, bearing even date with the expiration of the old lease, for a term not longer than ten years, as determined by the department, at a reappraised rental.

B. The preferred right of renewal shall not extend to a lessee who has not substantially complied with the terms of his lease or who has not placed the land to the use prescribed in the lease during the term thereof or within the time prescribed therein, unless for good cause the failure to perform was given written authorization by the department. If the department determines the continued leasing of the land not in the best interest of the state, the lease shall not be renewed.

§ 37-293. Reimbursement by succeeding lessee for non-removable improvements; application for appraisal; notice; failure to pay; penalty

A. A lessee of state lands shall be reimbursed by a succeeding lessee for improvements placed on the lands which are not removable. If the retiring lessee and the new lessee do not agree upon the value of the improvements, either party may file with the state land department an application for appraisal of the improvements. Thereafter an appraisal of the improvements shall be made in the same manner and subject to the same conditions as appraisals of improvements are made when state lands are sold.

B. Upon making the appraisal, the department shall give notice of the amount thereof by registered mail to each person interested in the appraisal. The notice shall require that the new lessee pay to the department for the prior lessee the entire amount of the appraisal within thirty days from the date of the notice, or the department, when the value is greater than the rental for the period of the lease, may require that payment of ten per cent of the appraised value be made within thirty days, fifteen per cent within sixty days, twenty-five per cent at the end of the first year of the new lease, and twenty-five per cent at the end of each year thereafter until the entire balance is paid.

C. If the improvements are not paid for as required in the notice, the succeeding lessee shall not be permitted to sell, assign, or transfer his lease, nor sell, assign or remove any improvements whatever from the land until the entire amount of the appraised value of the improvements has been paid. Upon default he shall be subject to the same penalties and liabilities as provided by § 37-288 for failure to pay rents, including a cancellation of the lease.

§ 41-511.06. Eminent domain

A. In acquiring property by eminent domain, no water, watering facilities or water right of any person shall be taken separate and apart from the land served by such water, watering facilities or water rights, without fair and adequate compensation to be awarded for such land and water, watering facilities or water rights.

B. In seeking to establish a state park or monument on state or federally owned land, the board shall not request the termination or cancellation of any valid lease, permit, government land entry, mining claim, privilege or other right unless fair and adequate compensation is awarded to the holder of such lease, permit, privilege or other right. If the amount of the compensation cannot be determined by agreement, the board may proceed to cause such lease, permit, privilege, government land entry, mining claim or right to be terminated or cancelled if such can be lawfully done by the state or federal agency having jurisdiction thereof, or the board may proceed to acquire the same by eminent domain. In any event the holder of such lease, permit, privilege, government land entry, mining claim or right shall receive fair and adequate compensation for the cost of and damage to his property interest or loss of his lease, privilege, government land entry, mining claim or permit. In determining the amount of such compensation, consideration shall be given to any preferential rights of renewal and other preferential rights of the owner or holder thereof, the damage to the remaining land, damage by access roads, and damage to the rights and operation which such owner may have and all other relevant factors.

Added Laws 1957, Ch. 99, § 1.